**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**



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| **In the Matter of** | ) | |
| | ) | |
| **Implementation of Section 402(b)(1)(A)** | ) | **CC Docket No. 96-187** |
| **of the Telecommunications Act of 1996** | ) | |



# REPLY COMMENTS OF MFS COMMUNICATIONS COMPANY, INC.

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Dated: October 24, 1996

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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**REPLY COMMENTS OF**
**MFS COMMUNICATIONS COMPANY, INC.**

MFS Communications Company, Inc. ("MFS"), by its undersigned counsel, respectfully submits the following reply comments in the above-captioned proceeding.[1]

## INTRODUCTION AND SUMMARY

MFS agrees with the Association for Local Telecommunications Services ("ALTS") and MCI Telecommunications Corp. ("MCI") that Congress left in place the key components of the tariff procedures of the Communications Act of 1934: local exchange carriers ("LECs") must still file tariffs; the Federal Communications Commission ("FCC" or "Commission") may exercise pre-effective review to suspend and investigate tariffs; the FCC may prescribe rates; and customers may obtain damages under the Section 206-209 complaint process.[2] MFS also agrees with MCI that in choosing to characterize the Section 204(a)(3) process as "streamlined," Congress made a clear

[1] *In the Matter of Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996, Notice of Proposed Rulemaking*, FCC 96-367, CC Docket No. 96-187 (rel. Sept. 6, 1996)("Notice" or "NPRM").

[2] ALTS Comments at 2, MCI Comments at 5.

reference to the FCC's past characterization of the term: a "streamlined" tariff review process incorporates both (1) shortened notice periods and (2) a presumption of lawfulness.[3] As the Ad Hoc Telecommunications Users Committee ("Ad Hoc Committee") points out, by using the term "deemed lawful," Congress conformed Section 204(a)(3) to current practice in which tariffs become the legal rate after they become effective.[4] To interpret it otherwise would be a significant substantive change in the law of tariffs.[5]

The Comments filed by the incumbent LECs ("ILECs") provide further cause for the Commission to proceed with caution in its implementation of Section 204(a)(3). ILECs continue to exercise substantial market power and therefore have a considerable ability to affect consumers and competitors negatively if their power goes unchecked. The elimination of existing rules, beyond those expressly identified by Congress, would dramatically increase the magnitude by which consumers could suffer through increased ILEC abuses. Further, the ability of such dominant providers to impede competitors, the very parties on whom Congress relies to bring choices to consumers, remains substantial and cannot be taken lightly. This is especially true in the early stages of opening the local market to competition since competitors must initially rely on and use the incumbents' network components, many of which will be included in ILEC tariffs that are eligible for streamlined treatment.

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[3]MCI Comments at 4.

[4]Ad Hoc Committee at i, 2. MFS notes that this interpretation allows for damages for LEC tariff revisions found unlawful after the tariff's effective date.

[5]Time Warner Communications Holdings, Inc. ("Time Warner") Comments at 4.

## I. "Deemed Lawful" Means "Presumed Lawful"

Most competitive carriers and ILEC customers supported the FCC's second interpretation of "deemed lawful." MFS, AT&T Corp. ("AT&T"), McLeod Telemanagement, Inc. ("McLeod"), and KMC Telecom, Inc. ("KMC") all supported a "presumption" of lawfulness that could be rebutted by a showing that it is more likely than not that the LEC tariff will be suspended.[6] This approach has the advantage of paralleling current FCC regulations at 47 C.F.R. § 1.773 which set forth a burden of proof for petitions against nondominant carrier tariffs.

Predictably, the ILECs generally supported the FCC's first proposed interpretation of "deemed lawful" and corresponding limitations on consumer remedies. Many ILECs argued that their tariffs should be "deemed lawful" on the date they are filed.[7] Some ILECs also argued for the total elimination of cost support requirements.[8] Southwestern Bell Telephone Company ("Southwestern Bell") went so far as to argue that the FCC should not permit public comment on any streamlined tariff filing and consumers should have no recourse for damages for the period before the FCC has found the effective tariff unlawful.[9] These are just three examples of the

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[6]AT&T Comments at 8, KMC Comments at 7, McLeod Comments at 4, MFS Comments at 8.

[7]GTE Service Corp. ("GTE") Comments at iv, 10; Pacific Telesis Group ("PacTel") Comments at 2-3; United States Telephone Association ("USTA") Comments at 3; US West, Inc. ("US West") Comments at 7.

[8]*See, e.g.* The Bell Atlantic Telephone Companies ("Bell Atlantic") Comments at 3, 7; Southwestern Bell Comments at 19.

[9]Southwestern Bell Comments at 3, 17.

unreasonable, anti-consumer, anti-competitive positions advocated by the ILECs.

The General Services Administration ("GSA") argues, and MFS agrees, that by adopting its first interpretation of "deemed lawful" and precluding customer remedies, the FCC would "unreasonably assume an unstated intent" of Congress by making such a fundamental change to the current regulatory framework governing LEC tariffs.[10] Such an interpretation of the phrase "deemed lawful" conflicts with sections 203, 205, 207, and 208.

MFS submits that there is a substantial difference between "deemed lawful" in the context of an effective tariff and "deemed lawful" in the context of consumer rights. Nowhere in the 1996 Act did Congress expressly state or imply that consumer rights should be subordinated to the desires of the dominant providers.[11] As major customers of the ILECs point out, "[t]here is no basis in the statutory language itself or the legislative history to indicate that Congress intended the 'deemed lawful' language to be read in such a way as to reverse *sub silentio* sixty years of judicial precedent regarding the abilities of customers to seek refunds for unreasonable charges."[12] Other than shortening the time frame for concluding such proceedings, Congress did not amend the Section 204(a)(1) hearing process or the Section 206-209 complaint process. The Commission must

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[10]GSA Comments at 4.

[11]Several of the ILECs advocate extreme interpretations of Section 204(a)(3) that would severely curtail consumer rights. *See*, Ameritech Operating Companies ("Ameritech") Comments at 14 (pre-effective review should be limited to a determination of whether the tariff on it face is clearly unlawful), Southwestern Bell at 13 (the FCC doesn't have the authority to institute a Section 204-type proceeding after the tariff's effective date).

[12]Capital Cities/ABC, Inc., CBS Inc., National Broadcasting Company, Inc. and Turner Broadcasting System, Inc. ("the Networks") Comments at ii.

therefore preserve the right of the consumer to a remedy for the entire period of tariff effectiveness.

Nor did Congress prohibit the Commission from investigating tariffs filed under Section 204(a)(3). In fact, Congress explicitly stated that a tariff filed on 7 or 15 days notice shall be deemed lawful and effective **unless** the Commission takes action under Section 204(a)(1) within that 7 or 15 day period. Nothing prohibits the FCC from putting all streamlined filings into a category of automatic investigation until due tariff review has occurred. MFS submits that such an automatic classification meets Congress' mandate to streamline LEC tariffs while preserving consumers' rights and limiting potential ILEC abuse of the streamlined tariff process. MFS also submits that adoption of Frontier Corporation's ("Frontier") proposed monetary forfeitures as penalties for noncomplying filings[13] is needed to counteract the substantial potential for abuse of the streamlined tariff process by ILECs.

## II. The FCC Should Restrict 7 and 15 Day Filings to ILEC Tariffs that Include Rate Decreases or Increases Associated with Existing Services

As MFS stated in its Comments, only tariffs that contain rate decreases or increases associated with existing service offerings should be eligible for 7 or 15 day notice periods. Such an approach would clearly reduce the damage that consumers and competition itself would suffer from potentially unlawful ILEC streamlined filings. As MFS indicated in its Comments, until new entrants serve at least one-third of U.S. local service customers, the Commission should strictly limit ILEC tariff streamlining to the express terms of Section 204(a)(3).

MFS disagrees with Cincinnati Bell and PacTel, both of whom argue that the FCC must treat

[13]Frontier Comments at 6.

incumbents and new entrants similarly.[14] There is a fundamental difference between competitive new entrants and incumbent monopolies. The FCC has recognized these differences in its *Competitive Carrier* proceedings and streamlined regulation of nondominant carriers accordingly. Congress was aware of the FCC's streamlined regulation of nondominant carriers' tariffs and it is counterintuitive to argue that Congress intended to increase regulation of nondominant carriers.

## III. Timely Public Notice of ILEC Tariff Filings and Public Participation in the Review Process is Essential

Many parties agreed that public notice of and participation in the tariff review process is essential. MCI and MFS both advocated requiring advanced notice of LEC tariff filings[15] and the Ad Hoc Committee and McLeod recommended requiring LEC tariff filings to be publicly available at 10 a.m. and noon, respectively.[16] MFS continues to urge the Commission to implement an electronic filing program for tariffs so that all consumers and interested parties will have access to the tariff and supporting materials on the same day the tariff is filed.

The Commission should ensure that interested parties have a meaningful opportunity to

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[14]Cincinnati Bell Comments at 5, PacTel Comments at 15. Although Time Warner and AT&T argue that Section 204(a)(3) does not apply to competitive LECs (CLECs), Time Warner Comments at 2-3, AT&T Comments at 4, n. 6, MFS respectfully disagrees. Section 204(a)(3) applies to all LECs and exemption for CLECs is not necessary. The statute provides that a LEC "may file" a tariff under the streamlined provisions. This provision, by its terms, is permissive, not mandatory, so a LEC may choose to file tariffs under other procedures. Accordingly, the Commission may continue to allow CLECs to file tariffs on the shorter notice periods specified in current regulations.

[15]MCI Comments at 21, MFS Comments at 10.

[16]Ad Hoc Committee Comments at 6, McLeod Comments at 7.

review and petition ILEC tariff filings. This public review will aid the Commission in its enforcement of ILECs' compliance with the Act and will create disincentives for ILECs to abuse the streamlined tariff process.

## CONCLUSION

In summary, MFS respectfully reiterates its request that the Commission adopt rules that balance the need for the public and interested parties to have a meaningful opportunity to challenge a LEC's tariffs with the Congressional directive to streamline specific LEC tariff filings.

Respectfully submitted,

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Dated: October 24, 1996

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## CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of October 1996, copies of Reply Comments of MFS Communications Company, Inc. were served by first class mail, postage prepaid, on the following:

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